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## Panel Rejects Ninth Circuit Split

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## Panel rejects Ninth Circuit split

by Carl Tobias

In its final report to the President and Congress on December 18, 1998, a federal commission rejected calls for splitting the large U.S. Court of Appeals for the Ninth Circuit into two separate circuits, but it did introduce the possibility of creating adjudicative divisions for the Ninth Circuit and others as they increase in size.

Congress authorized the Commission on Structural Alternatives for the Federal Courts of Appeals in November 1997, and Chief Justice William Rehnquist appointed the commissioners in December of that year. The panel had 10 months to study the federal appellate system, "with particular reference to the Ninth Circuit," and two months to write a report suggesting such modifications in circuit boundaries or structure as may be appropriate for the prompt and effective resolution of the appeals courts' caseload, "consistent with fundamental concepts of fairness and due process."

Throughout 1998, the commissioners sought public input on many issues that implicated their statutory mandate. During the spring, the commission held one-day public hearings in Atlanta, Chicago, Dallas, New York, San Francisco, and Seattle. The commissioners also enlisted the assistance of the Federal Judicial Center and the Administrative Office of the U.S. Courts, the two major research arms of the federal courts. For instance, the Center helped the commission develop surveys that the panel circulated to federal judges and appellate practitioners seeking their views on the appeals courts. The

commission reviewed all of the relevant information it had received and published a tentative draft report on October 7. The commissioners solicited public comment on that draft during a 30-day period and issued a final report on December 18.

The panel determined that the courts "are operating under the pressure of caseload increases that have transformed them into different judicial entities from what they were at mid-century [while] pressures continue, and there is little likelihood that caseloads and work burdens on the judges will lessen in the years ahead." The commissioners found "no persuasive evidence [that any] circuit is not working effectively or that creating new circuits will improve the administration of justice in any circuit or overall." The commission considered Ninth Circuit administration "innovative in many respects" and concluded that there was "no good reason to split the circuit solely out of concern for its size or administration [or] to solve problems [of] consistency, predictability and coherence of circuit law." The commission also stated that dividing the court would eliminate the administrative benefits offered by the current circuit configuration and deprive the Pacific seaboard and the West of a means to maintain consistent federal law in this region.

The commissioners rejected circuit-splitting, unless there were no other way of treating perceived difficulties in the court of appeals, and offered the concept of adjudicative divisions as an efficacious alternative for the Ninth Circuit, which

the panel suggested should be available to all of the appellate courts as they increase in size.

The commission specifically suggested that the Ninth Circuit remain intact but that it operate with three regionally based adjudicative divisions. The commissioners proposed that "each division with a majority of its judges resident in its region" have exclusive jurisdiction over appeals arising from district courts in those areas. The commission correspondingly recommended that a Circuit Division resolve conflicts that develop between regional divisions. The commissioners asserted that their "plan would increase the consistency and coherence of the law, maximize the likelihood of genuine collegiality, establish an effective procedure for maintaining uniform decisional law within the circuit, and relate the appellate forum more closely to the region it serves."

Realizing that Congress might reject the recommendation for adjudicative divisions and restructure the Ninth Circuit, the panel stated that the "challenge of finding a workable solution is daunting." The commissioners evaluated more than a dozen possibilities and "found each without merit." Nonetheless, the commission described the "only plans that are even arguable" but characterized all three as "flawed and [chose to] endorse none."

### Recommendations

The commission honored its statutory mandate by submitting several recommendations for change in the federal appellate system. First, the commissioners developed the idea of divisional organization both for the immediate Ninth Circuit situation and as an alternative to circuit-splitting for the remaining appeals courts as they grow. The commissioners, therefore, suggested a statute that would afford individual courts considerable flexibility in devising a divisional plan, emphasizing that the Ninth Circuit proposal was only one model.

Recognizing that the courts of appeals vary in terms of their size,

dockets, judicial resources, and growth rates, the commission urged that Congress "equip those courts to cope with future, unforeseen conditions by according them a flexibility they do not now have." The commissioners specifically recommended that Congress authorize each court of appeals to decide with panels of two, rather than three, judges cases that do not involve questions of public importance, pose special difficulty, or have precedential value. The commission also suggested that Congress authorize circuits to create district court appellate panels consisting of two district judges and one circuit judge to review designated categories of appeals, with discretionary review available in the court of appeals.

The commissioners contended that these measures collectively "should equip the courts of appeals with a structure and sufficient flexibility to accommodate continued caseload growth into the indefinite

future, while maintaining the quality of the appellate process and delivering consistent decisions—assuming, of course, that the system has the necessary number of judges and other resources."

The commission's suggestions, particularly those related to the divisional arrangement, received considerable criticism during the 30-day comment period. Members of Congress and attorneys from California voiced concern that the state's four federal districts would be split between the Middle and Southern Divisions, thereby raising the spectre of different legal interpretations within California. Numerous senators from the Pacific Northwest claimed that the reasons the commission offered for the divisional proposal also supported circuit-splitting. Seven active and senior appellate judges of the Ninth Circuit correspondingly took the unprecedented step of calling for the court's split into two circuits. However, virtually all of the remaining appellate judges sharply criticized

the practicality of the divisional idea, contending, for instance, that the Circuit Division would impose another layer of appeal and, thus, increase expense and delay. Despite this criticism, the commission made only minor changes in the final report.

The debate over the future of the federal appellate courts and the Ninth Circuit now returns to Congress. Some senators and representatives will probably introduce bills that embody the proposed legislation the commissioners developed. Members of Congress who disagree with the commission recommendations may offer measures that modify those suggestions or that would split the Ninth Circuit.

The full text of the commission's report can be found on the World Wide Web at <http://app.com.uscourts.gov>.

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## Letters

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courts need to take into account the "issues these task forces address." In the Wisconsin study, we were very concerned about those issues. In our brief report in *Judicature* we noted one interesting finding (that women seemed to have more positive evaluations of the courts than did men). In our full report (available from the Wisconsin Supreme Court) we describe the responses to a series of questions concerning the perception of bias based on gender, race, income, nationality, and age. We found relatively few respondents among court users (20 percent or less) who perceived differential treatment based on these factors. Interestingly, women were slightly less likely to perceive differential treatment based on gender than were men.

Because of the survey design there were relatively few respondents from racial minorities, which made meaningful analysis of the question on racial minorities impossible.

In summary, those who look at public perceptions of the trial courts are concerned about the factors addressed by equity task forces.

However, brief reports such as those published in *Judicature* do not necessarily discuss all aspects of a research project such as that conducted in Wisconsin.

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